Nos. 82-1264 and 82-1272

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In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission properly implemented Section 401 of the Natural Gas Policy Act of 1978 by promulgating a generic rule providing that interstate pipelines shall fully curtail lower priority customers before interrupting service to high priority and essential agricultural users, while allowing pipelines to seek adjustment from the rule in individual cases.

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OPINIONS BELOW

The panel opinion of the court of appeals (Pet. J.A. 1-105)[1] is reported at 694 F.2d 728. The opinion of the en banc court of appeals (Pet. J.A. 106-138) is reported at 694 F.2d 778. The orders of the Federal Energy Regulatory Commission (Pet. J.A. 139-327) are unreported.

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[1] "Pet. J.A." refers to the joint appendix to the petitions for a writ of certiorari.

JURISDICTION

The judgment of the en banc court of appeals (Pet. J.A. 331-333) was entered on October 1, 1982. The Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 29, 1983. The petition in No. 82-1264 was filed on January 28, 1983, and the petition in No. 82-1272 was filed on January 29, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 401 and 502(c) of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. (Supp. V) 3391 and 3412(c), and Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c and 717d, are set forth at 82-1264 Pet. App. 1a-4a, 5a-6a, 9a-10a, and at 82-1272 Pet. App. 1a-4a, 5a-6a, 9a-10a.

STATEMENT

1. Pursuant to Section 401 of the NGPA, 15 U.S.C. (Supp. V) 3391, the Federal Energy Regulatory Commission was required to implement a rule prescribed by the Secretary of Energy providing that, notwithstanding any other provision of law and to the maximum extent practicable, no curtailment plan of an interstate pipeline may provide for the interruption of deliveries of natural gas for any essential agricultural use below the use requirements certified by the Department of Agriculture,[2] unless the interruption is necessary to meet the requirements of high priority users. In the orders at issue here (Pet. J.A. 139-327), the Commission promulgated a rule requiring interstate pipelines to make a one-time filing of tariff sheets superimposing the two NGPA—mandated priority-of-service

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[2]The Department of Agriculture was charged by NGPA, Section 401(c), 15 U.S.C. (Supp. V) 3391(c), with identifying essential agricultural users and then certifying to the Secretary of Energy and the Commission the natural gas requirements of such users necessary to meet the requirements of full food and fiber production.

categories (consisting of high priority users and essential agricultural users, respectively) on their existing curtailment provisions (18 C.F.R. 281.204; Pet. J.A. 204-208). The Commission further provided that if a pipeline believed that the Commission's rule was unsuited for its individual system, relief could be sought through an application for adjustment under Section 502(c) of the NGPA, 15 U.S.C. (Supp. V) 3412(c).[3]

2. On petitions for review, the court of appeals upheld the Commission rule at issue here.[4] The panel rejected petitioners' contentions that the Commission's rule violates the nondiscrimination and procedural requirements of the Natural Gas Act and fails to implement the curtailment priorities of the NGPA (Pet. J.A. 28-35). The en banc court unanimously adopted

> the panel's view that the Commission's specific grants of authority under sections 401, 402, 501 and 502 of the NGPA control over the general requirements of sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§717c, 717d. In doing so, we accept the Commission's position that section 502(c) of the NGPA, 15 U.S.C. §3412, is an appropriate mechanism for correcting any inequities in specific plans that follow from application of its generic rule. By its terms, section 502(c) allows for adjustments "as may be necessary to prevent special hardship, *inequity, or an unfair distribution of*

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[3]Section 502(c) requires the Commission to adopt a rule that permits persons to seek adjustments from the provisions of the NGPA "as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens." The rule establishing procedures for seeking these adjustments appears at 47 Fed. Reg. 19041-19043 (1982) (to be codified at 18 C.F.R. 385.1101 *et seq.*).

[4]The court remanded the case to the Commission with respect to certain other matters not relevant to the instant petitions for certiorari.

burdens," 15 U.S.C. §3412 (emphasis added), and the Commission assures us that such adjustments have been granted promptly.

(Pet. J.A. 116 n.3).

ARGUMENT

The court of appeals applied proper legal principles in reviewing the Commission's rule implementing certain curtailment priorities specified in the Natural Gas Policy Act. The decision below, representing the unanimous views of the en banc court of appeals, is correct and does not conflict with the decisions of this Court or any other court; it does not warrant further review.

In enacting the NGPA, Congress directed the Commission to promulgate a rule that, "notwithstanding any other provision of law" and "to the maximum extent practicable," protects essential agricultural users from curtailment unless gas is needed to serve certain defined high priority requirements. NGPA Section 401(a), 15 U.S.C. (Supp. V) 3391(a). By establishing a high priority category and an essential agricultural user category and requiring a one-time adjustment of curtailment tariffs in order to superimpose those categories on existing curtailment plans, the Commission has not, as petitioner United argues (82-1272 Pet. 9), prescribed a rule intended to cover all aspects of a pipeline's curtailments.[5] Rather, as the en banc court of appeals unanimously concluded, the Commission has simply complied with the statutory mandate of the NGPA. Moreover, by permitting adjustments from the rule's requirements pursuant to Section 502(c), the Commission has provided

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[5]For example, the Commission's rule imposes no requirements with respect to such fundamental aspects of curtailment plans as the categorization of all gas uses not covered by Title IV of the NGPA, selection of a current or historical base period, and treatment of storage gas.

"an appropriate mechanism for correcting any inequities in specific plans that follow from application of its generic rule" (Pet. J.A. 116 n.3). The Commission's rule thus comports fully with the "to the maximum extent practicable" language of Section 401(a) of the NGPA.[6]

The en banc court of appeals properly held (Pet. J.A. 116 n.3) that the language "notwithstanding any other provision of law" in Section 401 of the NGPA reflects the intent of Congress that the specific authority granted to the Commission in Title IV of the NGPA supersede Sections 4 and 5 of the Natural Gas Act. It must be emphasized, however, that the NGPA's curtailment provisions supersede the provisions of the Natural Gas Act only to a very limited extent. Thus, petitioners' contention (82-1264 Pet. 25; 82-1272 Pet. 18) that, as a result of the Commission's rules, Section 502(c) of the NGPA has replaced Sections 4 and 5 of the Natural Gas Act as the review standard for determining the lawfulness of curtailment plans is incorrect. As the Commission recently stated, the NGPA requirements have supplanted Section 4 of the Natural Gas Act only with respect to the "establishment and implementation of the higher curtailment priorities." *United Gas Pipeline Co.*, Op. No. 150, 21 F.E.R.C. (CCH) para. 61,016, at 61,077 (Oct. 8, 1982). The traditional Section 4 requirements still apply with respect to all aspects of curtailment allocations not covered by Title IV of the NGPA. See note 5, *supra*.

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[6]The flexibility of the Commission's adjustment process is amply demonstrated by the Commission's treatment of the curtailment plan submitted by petitioner United.

Petitioners' primary concern below was with a provision of the Commission's regulations that provides that deliveries in lower curtailment priorities should be fully curtailed before any interruption of priority 1 or 2 service (18 C.F.R. 281.205(b)). United's court-ordered curtailment plan then in effect, by contrast, employed "differential curtailment rates" to the pipeline and direct market customers, pursuant to which priority 1 and 2 requirements could be curtailed while

Similarly without merit is the contention (82-1264 Pet. 16-23) that the Commission, by barring implementation of tariff sheets that do not comply with the curtailment rule (absent an adjustment from the rule), has improperly used its general rulemaking powers to extend indefinitely the five-month suspension period established by Section 4 of the Natural Gas Act. The Commission's decision withholding permission to implement nonconforming tariffs is tantamount to rejection of such tariffs until an adjustment can be obtained.[7] It is well within the Commission's authority to reject tariff filings that violate its regulations. See

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lower priority direct market requirements were being served. *Southern Natural Gas Co.* v. *FPC*, 543 F.2d 530, 532-533 (5th Cir. 1976); *United Gas Pipe Line Co.*, Op. No. 32, 5 F.E.R.C. (CCH) para. 61,093 (Oct. 31, 1978). Moreover, a pending settlement prescribing a permanent curtailment plan for United would have provided that the essential agricultural use priority would be implemented on a relief basis rather than automatically.

Faced with an inconsistency between the Commission's curtailment regulations and its existing and proposed curtailment plans, United filed an application for an adjustment from the regulations. On October 8, 1982, the Commission issued an order approving the settlement and establishing a permanent curtailment plan for the United system. Parties opposing the settlement had argued that the plan should be rejected for failure to comply with Section 401 of the NGPA. The Commission rejected these arguments, holding that the settlement did not violate Section 401, since the Commission had also granted United an adjustment from the requirements of the curtailment regulations. *United Gas Pipeline Co.*, Op. No. 150, 21 F.E.R.C. (CCH) para. 61,016 (Oct. 8, 1982).

In view of the Commission's approval of United's permanent curtailment plan under Section 401 and its determination that United was entitled to an adjustment from the requirements of the curtailment regulations, petitioners arguably are not aggrieved by the orders for which review is sought. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967).

[7]Where it is necessary, the Commission either has granted interim relief, as in United's case (see note 6, *supra*) or has acted expeditiously to grant such adjustments (see Pet. J.A. 116 n.3).

Municipal Light Boards v. *FPC*, 450 F.2d 1341, 1345 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972).

Finally, petitioners' argument (82-1272 Pet. 15) that a different rule *could* have been promulgated by the Commission is irrelevant. The standard of review applicable to informal agency action is the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. 706(2)(A), which requires only that the Commission articulate a rational basis for its decision. See *Bowman Transportation Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974). Under this standard, the reviewing courts are not free to substitute their judgment for that of the agency. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). In this case, the Commission's curtailment rule implementing Section 401(a) of the NGPA closely tracks the statutory language and clearly reflects rational decisionmaking.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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